

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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Affidavit
To be Argued by
SHERRY J. LEIWANT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6089

JAMES E. CHRISTIAN,

Plaintiff-Appellant,

- v -

JOSEPH A. CALIFANO, JR., Secretary
of Health, Education and Welfare,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-6089

JAMES E. CHRISTIAN,

Plaintiff-Appellant,

- v -

JOSEPH A. CALIFANO, JR.,
Secretary of Health, Education
and Welfare,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

The plaintiff-appellant James E. Christian appeals from a judgment entered in the United States District Court for the Southern District of New York on April 12, 1977, dismissing plaintiff-appellant's complaint with prejudice. This judgment was entered pursuant to an endorsement order of the Honorable Lawrence W. Pierce, dated April 6, 1977 adopting the recommendation of Magistrate Leonard Bernikow made on February 7, 1977 that judgment be entered affirming the decision of the Secretary, defendant-

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appellee,* and overruling plaintiff-appellant's objections to the Magistrate's Report.**

Issues Presented

1. Did the District Court err in finding that the Secretary's decision that plaintiff was not disabled within the meaning of the Social Security Act was supported by substantial evidence?
2. Did the District Court err in finding that plaintiff was not prejudiced by his lack of counsel?

Statement of the Case

A. Prior Proceedings

Mr. Christian (the "plaintiff") originally filed an application for a period of disability and for disability insurance benefits on July 13, 1971, alleging disability

* Joseph A. Califano succeeded David Mathews, the defendant below, as Secretary of Health, Education and Welfare on January 25, 1977, and the caption of appellee's brief has therefore been modified to confirm to this state of facts pursuant to Rule 43(c) of the Federal Rules of Appellate Procedure.

** For the convenience of the Court, the Magistrate's Report and the Endorsement Order of the District Court are attached hereto as an Addendum.

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due to gunshot wounds (Tr. 51-54).* That application was denied on November 19, 1971. (Tr. 57).** On November 30, 1972, plaintiff filed another application for a period of disability and disability insurance benefits. In that application, plaintiff alleged that June 20, 1971 was the date of onset of his disability which was the result of a bullet in his coccyx, weakness, and lack of feeling in the upper leg. On September 5, 1973, plaintiff's application was denied on the ground that plaintiff was not disabled. Plaintiff requested a reconsideration on April 24, 1974 and on June 20, 1974, after obtaining the independent valuation of the Bureau of Disability Determination, New York State Department of Social Services (Tr. 67), the Bureau of Disability Insurance of the Social Security Administration again reached the conclusion that plaintiff was not disabled. (Tr. 70). Plaintiff requested a hearing on his claim by letter dated November 25, 1974 (Tr. 17-19). The hearing was held on June 3, 1975 before an Administrative Law Judge who

* "Tr." refers to the transcript of the administrative record before the Social Security Administration, a certified copy of which was filed as part of the Secretary's answer to the complaint in the District Court pursuant to 42 U.S.C. 405(g). Four copies of the transcript will be filed with this Court and designated as exhibits pursuant to Rule 30(e) of the Federal Rules of Appellate Procedure.

** Plaintiff did not appeal from the denial of this November 19, 1971 application for benefits and that application is therefore not before the court.

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considered the case de novo. Plaintiff appeared and testified in his own behalf (Tr. 20-50). On June 30, 1975, the Administrative Law Judge found that plaintiff was not under a disability (Tr. 7-12) and his decision became the final decision of the Secretary of Health, Education and Welfare when the Appeals Council approved it on October 6, 1975 (Tr. 44).

The action below was commenced on February 1, 1976. Plaintiff filed an "Answer" outlining his disagreement with the decision of the Secretary denying him disability benefits, and the defendant filed a motion for judgment on the pleadings. Pursuant to Mathews v. Weber, 423 U.S. 261 (1976), Judge Pierce referred the case to Magistrate Leonard Bernikow for a recommendation. On February 7, 1977, Magistrate Bernikow filed a report on this case recommending that the Secretary's determination be affirmed and that judgment on the pleadings be granted in the Secretary's favor. On February 18, 1977, plaintiff filed objections to the Magistrate's Report. The District Court, on April 6, 1977, overruled plaintiff's objections and adopted the Report of the Magistrate in full. On April 29, 1977, judgment was entered dismissing plaintiff's complaint and plaintiff appealed from that order on June 2, 1977.

B. Statement of Facts

Plaintiff was born on November 26, 1920 (Tr. 51,60). He has worked as an automobile salesman for most of his life (Tr 25, 52). Plaintiff claims that he has been disabled since June 20, 1971 when he was shot in the stomach while attempting to aid the victim of a robbery. During 1972, plaintiff collected unemployment insurance benefits from New York State which requires a recipient of unemployment insurance to be "ready, willing and able" to return to work,* during 1973, plaintiff worked in his customary occupation as a salesman, and subsequent to 1973, plaintiff again applied for unemployment insurance benefits (Tr. 25, 28-29, 37-38, 104).

1. Medical Evidence The medical evidence establishes that plaintiff was hospitalized from June 21, 1971 until July 6, 1971 at Columbia Presbyterian Medical Center due to a gunshot wound to his abdomen (Tr. 106-114). Various laboratory tests were performed during plaintiff's hospitalization (Tr. 107-113). Those tests indicated that plaintiff's only medical problem was the bullet lodged in his coccyx. A chest x-ray was negative, an intravenous pyelogram was normal except for the bullet and x-rays showed a normal lumbosacral spine (Tr. 112). On June 24, 1971, an exploratory operation was done to locate the bullet which was found near plaintiff's coccyx. The area in which the bullet was found was drained of pus and fluids (Tr. 113-114). On July 6, 1976, plaintiff was discharged (Tr. 115).

* New York Labor Law §591(2).

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The hospital's summary report dated July 10, 1971 indicated that plaintiff was "[a] well developed, well nourished male in no acute distress" (Tr. 106). The discharge diagnoses were gunshot wound to the right lower quadrant, and some neurological deficit to plaintiff's right lower extremity secondary to the gunshot wound (Tr. 115).

Plaintiff was readmitted to Presbyterian Hospital on September 6, 1971 for removal of the bullet (Tr. 116-130). Plaintiff's only pathology at that time was the bullet imbedded in his coccyx. An operation was performed on September 11, 1971 in which the bullet and the tip of the coccyx were removed. Plaintiff was in satisfactory condition when he was returned to the recovery room following this surgery, and his post operative course was uneventful (Tr. 117, 128). Plaintiff was discharged on September 17, 1971 (Tr. 116).

Following his operation, plaintiff was seen by Dr. Basil Zikria, a general surgeon (Tr. 139). On October 13, 1971, plaintiff saw Dr. Zikria in his office and complained that he was still having pain in his abdominal incision and had difficulty sitting. Dr. Zikria noted that the incision had healed and advised "sitz" baths and aspirin or bufferin for the pain plaintiff might have in sitting (Tr. 134). There was no indication of any neurological deficit and the only restriction in activity that Dr. Zikria advised was limitation in sitting for prolonged periods of time (Tr. 137).

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Plaintiff was again seen by Dr. Zikria over a year later on November 6, 1972. At that time, plaintiff complained of shooting pains down his thigh and some discomfort in the area of the coccyx. Dr. Zikria, who was not a neurologist, thought that there might be sciatica* and advised plaintiff to see a neurologist. Dr. Zikria also noted that plaintiff was able to walk and get on and off the examination table without difficulty. Although the doctor thought that there might be some slight restriction of plaintiff's movement, such restriction was not considered severe (Tr. 138). A neurological examination from Columbia Presbyterian Hospital indicated no neurological basis for plaintiff's complaints of pain and noted that plaintiff's gait was normal (Tr. 133).

Dr. Zikria filled out a form for the New York City Department of Social Services on January 16, 1975, listing plaintiff's diagnosis as coccydymia.** Dr. Zikria checked the box indicating that plaintiff could not work at his usual occupation but did not elaborate on the reasons.

* Sciatica is an inflammation of the sciatic nerve, a nerve which runs down the thigh and terminates a little below the middle of the thigh. Medical Dictionary For Lawyers (3d Ed. 1960).

** Coccydymia is defined as pain in the area around the coccyx. Stedman's Medical Dictionary, (4th Ed. 1976).

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He also indicated that, in his opinion, plaintiff could work part time for four hours a day, three day a week and that plaintiff could, to a limited extent, walk, climb, stand, stoop, bend, lift, push and pull. The only activity that Dr. Zikria indicated plaintiff could not perform was work at high rates of speed (Tr. 105).

Plaintiff was examined by Doctor Walter Besser on May 27, 1975 in conjunction with his application for Supplemental Security Income (SSI) benefits.* Dr. Besser noted that plaintiff complained of hyperesthesia** over the medial aspect of the right thigh, episodes of buckling of the right knee and pain over the lumbosacral spine. Dr. Besser found plaintiff was not limited in walking, standing or sitting, could lift up to 50 pounds and could bend every 10 minutes. There was no weakness in plaintiff's upper extremities. Dr. Besser found plaintiff to be well developed and in no apparent distress. His gait was normal with a slight tendency to lurch to one side; there was no

* Plaintiff's claim for SSI benefits was subsequently denied because plaintiff's impairment was not sufficiently severe and it was felt that plaintiff could engage in his former employment (Tr. 150). No appeal was taken from that denial and the SSI application is therefore not part of this case.

** Hyperesthesia is abnormal sensitivity to touch, pain or other sensory stimuli. Stedman's Medical Dictionary (4th Ed. 1976).

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deficit in his cranial nerve; his cervical spine showed full range of motion without deformities and his chest was symmetrical without deformities. No tenderness was noted over the spine, the sacro-iliac area or the sciatic notch. Test of plaintiff's range of motion of the lumbosacral spine indicated that plaintiff could flex to 80° and extend to 45°. There was a slight decrease of right knee reflexes and hyperesthesia over the right thigh, but the hips, knees and ankles retained full range of motion. Dr. Besser's final impression was post gunshot wound to the abdomen with no apparent spinal involvement and some low back disease with minimal impairment of the lumbosacral spinal function (Tr. 152, 154, 155). Dr. Alan K. Bleich reported on May 27, 1975 that he had found no bone or joint abnormality of the knee though there were indications of an arthritic process in the lumbosacral spine (Tr. 133).*

* The exhibits contained in the transcript from Tr. 152 to 154 are somewhat illegible. While it has been held that illegible exhibits can form part of the basis for a remand where there is no way to tell whether the Administrative Law Judge could or could not read the exhibits, Cutler v. Weinberger, 516 F.2d 1282 (2d Cir. 1975), that reasoning is not applicable here. In the first place, it is clear from the record that the Administrative Law Judge had access to legible copies of those exhibits as he quoted from them. In the second place, the exhibits involved, Dr. Besser's reports, are not helpful to plaintiff but rather hurt his case. Legible copies of these exhibits were presented to the District Court by affidavit of Thomas E. Mosely, Esq. on February 3, 1977.

2. Non-Medical Evidence Plaintiff testified at his hearing that he had worked as a salesman all his life, generally as an automobile salesman (Tr. 25). Plaintiff described his work in an interview with a representative of the Social Security Administration on August 31, 1971. He stated at that time that his job involved no lifting, carrying, pushing, pulling or climbing and that during the course of an eight day, he would generally spend approximately one third of the day standing, one third sitting and one third walking. Plaintiff stated that the work he did required him to show cars to customers, walk around the salesroom and do paper work. No physical labor was involved (Tr. 79).

Following plaintiff's hospitalizations, he began receiving unemployment compensation at the beginning of 1972 (Tr. 37). In June of 1973, plaintiff returned to his usual occupation of car salesman. He earned approximately \$6,000 between June, 1973 and December, 1973 when he stopped working (Tr. 26). Plaintiff, in applying for unemployment benefits, claimed that he was laid off but his employer claimed that he was discharged for cause (Tr. 26-27).*

* Plaintiff was initially denied unemployment compensation because of allegations that he left his employment voluntarily by provoking his discharge. However, on appeal to the Appellate Division of New York, plaintiff's case was remanded for further proceedings as it was unclear that plaintiff was guilty of misconduct (Tr. 147-49).

The dispute between the employer and plaintiff appeared to involve a car which was loaned to plaintiff by his employer and also a disagreement as to the amount of time plaintiff was authorized to take for vacation (Tr. 148-49). There is no indication that plaintiff left his employment because he was physically unable to perform his job properly.

After leaving his job as a car salesman, plaintiff applied for unemployment compensation. When asked at his hearing whether he realized that he was eligible for unemployment benefits only if he was ready, willing and able to work, plaintiff replied, "Yes, I was ready, able and willing to work, but they let me go." (Tr. 29).

Plaintiff testified on his own behalf at his hearing. The Administrative Law Judge informed plaintiff that he had the right to appoint a representative. Plaintiff replied that "I think that I can best represent myself because I know more about it than anybody else and you will get it first hand." (Tr. 22). Later in the hearing plaintiff stated that "This is why I don't need a lawyer, because a lawyer don't understand like I do. I would have to explain it to the lawyer. I can explain it better than a lawyer can explain it. Because I am the one that suffered the pain and I'm the one that knows more about it. I can talk, so what do I need a lawyer for." (Tr. 42).

Following the hearing, the Administrative Law Judge issued a decision that plaintiff was not disabled within the meaning of the Social Security Act. He based this determination on the findings that (a) "the claimant sustained an injury to the spine which was not sufficiently severe to preclude substantial gainful activity for 12 months or more" and (b) "the claimant retain residual capacity to return to work as an automobile salesman." The Administrative Law Judge considered plaintiff's complaints including his complaints of pain but found that such complaints did not establish plaintiff's claim when evaluated with the doctor's reports that indicated plaintiff had sufficient functional capacity to perform the tasks required of an automobile salesman (Tr. 11). In addition, the fact that plaintiff had actually worked at his former occupation during his alleged period of disability was also considered by the Administrative Law Judge as indicative of plaintiff's ability to engage in his former occupation.*

* Plaintiff attempted to present additional evidence to the district court concerning a hernia operation. Judicial review under 42 U.S.C. 405(g), however, is limited to the administrative record by the terms of the statute. Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970).

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ARGUMENT

POINT I

THE SECRETARY'S DECISION IS SUPPORTED
BY SUBSTANTIAL EVIDENCE AND SHOULD BE
AFFIRMED

A. The Scope of Review

Judicial review of the Secretary's decision in a case involving a claim for disability benefits is limited to a determination of whether the Secretary's findings are supported by substantial evidence, 42 U.S.C. 405(g); Richardson v. Perales, 402 U.S. 389 (1971); Gold v. Secretary of Health, Education and Welfare, 463 F.2d 38 (2d Cir. 1972); Franklin v. Secretary of Health, Education and Welfare, 393 F.2d 640 (2d Cir. 1968). Substantial evidence in this context has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, *supra*, 402 U.S. at 401, quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Rivas v. Weinberger, 475 F.2d 255 (5th Cir. 1973); Hofacker v. Weinberger, 382 F. Supp. 572, 575 (S.D.N.Y. 1974).^{*} The substantial evidence test should be applied not only to findings as to basic evidentiary facts but also to inferences and conclusions to be drawn from such facts. Levine v. Gardner, 360 F.2d 727, 730 (2d Cir. 1960); McHale v. Mathews, 416 F. Supp. 1191, 1192 (S.D.N.Y. 1976).

^{*} This court recently articulated the substantial evidence standard in National Labor Relations Board v. The Grease Company, Dkt. No. 76-4087, S. Op. at 4 (2d Cir. March 30, 1977) when it stated that "substantial" in the context of substantial evidence means "such evidence as would prevent the direction of a verdict in a jury trial."

The reviewing court has no authority to try the case de novo and substitute its findings for those of the Secretary. Franklin v. Secretary, supra; Ehrenreich v. Weinberger, 397 F. Supp. 693 (W.D.N.Y. 1975); Selig v. Richardson, 379 F. Supp. 594, 598 (E.D.N.Y. 1974); Mullen v. Gardner, 256 F. Supp. 588, 590 (E.D.N.Y. 1969). Accordingly, the decision of the Secretary must be upheld if there is substantial evidence to support it, even though the court may have reached a different conclusion if evaluating the evidence independently. Reading v. Mathews, 542 F.2d 993, 997-998 (7th Cir. 1976). The court cannot displace the administrative body's choice between two fairly conflicting views. Blalock v. Richardson, 483 F.2d 773 (4th Cir. 1972); Palmer v. Celebrezze, 334 F.2d 306 (3d Cir. 1964); Hofacker v. Weinberger, supra, 382 F. Supp. at 576. It is thus the job of the Secretary to resolve any conflicts in the evidence and to determine the credibility of witnesses. Richardson v. Perales, supra; Alvarado v. Weinberger, 511 F.2d 1046, 1049 (1st Cir. 1975); Dolan v. Celebrezze, 381 F.2d 231 (2d Cir. 1967).

B. Plaintiff's Burden Of Proof

In order to establish entitlement to a period of disability benefits, the burden is on the plaintiff to come forward with sufficient evidence to establish that he was unable to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of twelve months or more. 42 U.S.C. 423(d)(1), (5); Franklin v. Secretary, supra; Hofacker v. Weinberger, supra. The mere presence of a disease or impairment is not disabling within the meaning of the Social Security Act. In order to establish disability within the meaning of the Act, plaintiff must show that his disease or impairment causes such limitations that he is unable to engage in any substantial gainful activity. Henry v. Gardner, 381 F.2d 191, 195 (6th Cir.), cert. denied, 389 U.S. 993, rehearing denied, 389 U.S. 1060(1967); Franklin v. Secretary, supra, 393 F.2d at 642; Gotshaw v. Ribicoff, 307 F.2d 840, 844 (4th Cir. 1962), cert. denied sub nom. Heath v. Richardson, 372 U.S. 945 (1963).

When making a finding as to claimant's ability or inability to engage in any substantial gainful activity, four elements of proof should be considered: (1) medical

data and findings: (2) expert medical opinion; (3) subjective complaints and (4) claimant's age, educational background and work history. Gold v. Secretary, supra; Underwood v. Ribicoff, 298 F.2d 850, 851 (4th Cir. 1962).

The Secretary has the burden of presenting evidence of specific types of employment that plaintiff is capable of performing only after plaintiff has carried his burden of demonstrating that he can no longer perform the work required in his former occupation. Menses v. Secretary of Health, Education and Welfare, 422 F.2d 803, 806 (D.C. Cir. 1971).

C. The Secretary's Findings and Their Evidentiary Bases.

Following a hearing at which plaintiff presented testimony concerning the disabling nature of his impairments, the Administrative Law Judge found that although plaintiff had sustained an injury to his spine, that injury was not of sufficient severity to preclude plaintiff from engaging in substantial gainful activity for 12 months or more and that plaintiff retained the capacity to return to his former work as an automobile salesman. Accordingly, plaintiff's claim for disability benefits was denied. As these findings were supported by substantial evidence, the decision of the Secretary denying plaintiff disability benefits is entitled to affirmance. Richardson v. Perales, supra; Levine v. Gardner, supra; Kerner v. Celebrezze, 340 F.2d 736 (2d Cir.) cert. denied, 382 U.S. 861 (1965).

Plaintiff's work history reveals that plaintiff worked for most of his life as an automobile salesman (Tr. 25). By plaintiff's own description, his job as an automobile salesman involved showing cars to customers, walking around the salesroom and doing paper work. No physical labor such as lifting, carrying, pushing, pulling or climbing was involved and an eight-hour day would generally involve about one third standing, one third sitting and one third walking (Tr. 79). Plaintiff has not demonstrated by the evidence that he has presented that he suffers from an impairment that would preclude him from returning to his work as a car salesman.

1. Medical Evidence Plaintiff rests his claim for disability benefits upon an injury sustained in June of 1971 when plaintiff was shot in the abdomen. However, the medical evidence of record does not support plaintiff's claim that the effects of that gunshot wound prevent plaintiff from engaging in substantial gainful employment for a period of 12 months or more. According to the medical evidence, the shot caused plaintiff to be admitted to Columbia Presbyterian Hospital in June and September of 1971. During the June hospitalization, laboratory tests and exploratory surgery indicated that a bullet was lodged in plaintiff's coccyx. Secondary to this gunshot wound, some

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neurological deficit was reported. All other tests indicated that plaintiff's only medical problem was his bullet wound and a hospital discharge summary described plaintiff as a "well developed, well nourished male in no acute distress." (Tr. 106-115). On September 6, 1971, plaintiff returned to Columbia Presbyterian for an operation to remove the bullet. Following the operation in which part of plaintiff's coccyx was removed, plaintiff was reported to be in satisfactory condition and his recovery was unremarkable (Tr. 111-128). After his discharge from the hospital, on October 13, 1971, plaintiff was seen by Dr. Basil Zikria who noted that plaintiff's abdominal incision had healed. In response to plaintiff's complaints of pain in the incision and difficulty in sitting, Dr. Zikria advised "sitz" baths and aspirin or bufferin. At that time, there was no indication of any neurological deficit and the only limitation of activity that Dr. Zikria advised was a limitation on sitting for prolonged periods of time (Tr. 134-137). Thus, four months after plaintiff sustained the gunshot wound, the only limitation that his treating physician placed upon him was avoidance of prolonged sitting, an activity not involved in plaintiff's job. When Dr. Zikria examined plaintiff more than a year later, he found that plaintiff was able to walk and get on and off the examining table without difficulty. At that time, Dr. Zikria thought that although

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there might be some slight restriction of plaintiff's movement, such restriction was not severe. (Tr. 138). A neurological examination at Columbia Presbyterian Hospital in 1972 indicated no neurological basis for plaintiff's complaints of pain (Tr. 133). In May, 1975, plaintiff was examined by Dr. Walter Besser. Dr. Besser found plaintiff to be well developed and in no apparent distress and Dr. Besser did not think that there were any limitations on plaintiff's ability to walk, stand or sit. Plaintiff's cervical spine showed a full range of motion and plaintiff could flex to 80° and extend to 45°. Despite a slight decrease in right knee reflexes and hyperesthesia over the right thigh, plaintiff's hips, knees and ankles retained full range of motion. Dr. Besser concluded that there was no spinal involvement and minimal impairment of the lumbosacral spinal function despite some lower back disease. (Tr. 152, 159-155). A report from Dr. Alan R. Bleich indicated no bone or joint abnormality of the knee though there were indications of an arthritic process in the lumbosacral spine. All of this evidence taken together indicates that plaintiff retained the capacity to perform the tasks required of a car salesman.

The only medical evidence that plaintiff could point to as supportive of his claim for disability benefits was a report which Dr. Zikria filled out on January 16, 1975 for the New York City Department of Social Services. On that form Dr. Zikria checked the box indicating that plaintiff could not work at his usual occupation. He also indicated that plaintiff could work part time for four hours a day, three days a week and that plaintiff could, to a limited extent, walk, climb, stand, stoop, bend, lift, push, and pull. The only activity that Dr. Zikria indicated plaintiff could not perform was work at high speeds. (Tr. 105). Dr. Zikria did not give any medical reasons for the limitations on plaintiff's activity except to say that plaintiff suffered from coccydynia or pain in the area of the coccyx.

The statement in this report that plaintiff could not return to his former job contradicts the bulk of the medical evidence including Dr. Zikria's own evaluation of plaintiff's condition in 1971 and 1972. It is for the Secretary as trier of fact to resolve all conflicts in the evidence including conflicts in the medical evidence. Alvarado v. Weinberger, supra; Grant v. Richardson, 445 F.2d 656 (5th Cir. 1971); Clark v. Weinberger, 389 F. Supp. 1168 (D. Vt. 1974); Hofacker v. Weinberger, supra, 382 F. Supp. at 576. In the present case, it was certainly proper for

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the Secretary to resolve the conflict in the evidence by according less weight to the conclusion in the January, 1975 report of Dr. Zikria that plaintiff could not return to his usual occupation than to the rest of the medical evidence which indicated that plaintiff retained the capacity to engage in his former occupation. The 1975 report of Dr. Zikria contained no medical data to support his conclusion that plaintiff should not return to his former job. A physician's conclusion on the issue of disability is generally not determinative of the ultimate fact of disability, particularly when there is more detailed medical evidence in the record. 20 C.F.R. 404.1526; Rodriguez v. Celebrezze, 349 F.2d 494 (1st Cir. 1965); Gotshaw v. Ribicoff, supra, 307 F.2d at 844; Hofacker v. Weinberger, supra. As stated in Mullen v. Gardner, supra, 256 F. Supp. at 590, the Secretary is not bound by a physician's "ultimate conclusion of disability if this opinion is unsupported or contradicted by underlying medical data." Although such opinions may be considered, the amount of weight given them will ordinarily depend upon the degree to which such opinions are supported by clinical and diagnostic findings. 20 C.F.R. 404.1526; Sykes v. Finch, 443 F.2d 192 (7th Cir. 1971); Durham v. Gardner, 392 F.2d 168 (4th Cir. 1968).

In cases where a treating physician's unsupported assertion of inability to work conflicts with the

substance of more detailed earlier findings, it is proper for the Secretary to accord little weight to the later unsupported conclusion. In Blalock v. Richardson, supra, 483 F.2d at 777, the Secretary's decision to disregard a 1970 report by plaintiff's physician that plaintiff's impairment was very serious was approved by the court in light of a 1964 report by the same physician that stated that plaintiff responded favorably to treatment and was released in good condition. The same analysis was applied in Kirkland v. Weinberger, 480 F.2d 46 (5th Cir. 1973). In Kirkland, the plaintiff had entered the hospital at various times but was always discharged as recovered and worked during certain periods. Taken as a whole, the record did not establish a disability. The only evidence in favor of plaintiff's claim was a certificate by the treating physician that Mrs. Kirkland was totally disabled. The court held that:

This statement which is not only not supported by any clinical or laboratory findings but is directly contrary to the same doctor's hospital admission history, does not represent substantial evidence establishing a statutory disability. 480 F.2d at 49.

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In the present case, similarly, the form filled out by Dr. Zikria for New York State in 1975 contained mere conclusions as to plaintiff's ability to return to his former job. In light of Dr. Zikria's earlier evaluations based on medical examinations of plaintiff that restrictions on plaintiff's activities were minor as well as the other evidence of record, it was proper for the Secretary to conclude that Dr. Zikria's 1975 report should be accorded little weight.

The bulk of the medical evidence including the hospital reports, Dr. Zikria's earlier reports and the report of Dr. Besser supports the conclusion that plaintiff, though suffering some slight impairment to his spine, is capable of engaging in a wide range of activities that would enable him to perform his job as a car salesman.

Plaintiff's complaints that Dr. Besser's report was prejudiced are without foundation.* Opinions of con-

* Plaintiff's letter to Judge Lawrence W. Pierce in reply to the Report of Magistrate Bernikow, February 17, 1977, p. 3.

sulting physicians are proper evidence to be used in evaluating plaintiff's claim of disability. As stated in Richardson v. Perales, 402 U.S. 389 (1971), with regard to the use of consulting physicians in that case:

Each report presented here was prepared by a practicing physician who had examined the claimant. A majority were called into the case by the state agency ... We cannot and do not ascribe bias to the work of these independent physicians, or any interest on their part beyond the professional curiosity a dedicated medical man possesses. 402 U.S. at 402-03.

There is no indication here that Dr. Besser's report was in any way biased and, therefore, it was properly considered by the Secretary. Furthermore, this is not a case in which a consulting physician's report is the sole basis for the Secretary's finding that plaintiff is not disabled. Although it has been held that the opinion of a consulting physician who examines plaintiff once cannot be accorded more weight than the reports of plaintiff's treating physicians, Robinson v. Richardson, 360 F. Supp. 243 (E.D.N.Y. 1973); Mullen v. Gardner, supra, in the present case the earlier reports of plaintiff's treating physician and the hospital reports as well as the consulting physician's report all support the Secretary's conclusion that plaintiff is capable of returning to his former employment. The medical evidence taken as a whole supports the Secretary's conclusion that plaintiff is not disabled.

2. Work During Alleged Period of Disability

The Secretary properly considered plaintiff's return to his former occupation as a car salesman in June, 1973, during his alleged period of disability, as further evidence that plaintiff was not disabled.

The Social Security Act states that under criteria established by the Secretary, performance of certain work will be deemed to demonstrate an ability to engage in substantial gainful employment such that an individual who performs such work during his alleged period of disability will not be considered disabled. 42. U.S.C. §423(d)(4). The purpose of this provision as explained in the Senate Report recommending enactment was:

"...to reaffirm that an individual who does substantial gainful work despite an impairment or impairments that might otherwise be considered disabling is not disabled for purposes of establishing a period of disability or for social security benefits based on disability during any period in which such work is performed. U.S. Code, Cong. and Admin. News, 90th Cong., 1st Sess. 2883 (1967).

The pertinent regulations provide that if an individual performed work during any period in which he alleges that he was under a disability, the work performed may indicate that the individual has the ability to engage in substantial gainful employment. Work is to be evaluated to see if it is productive in nature and performed for remuneration or profit. 20 C.F.R. 404.1532(a). The adequacy of the individual's performance, 20 C.F.R. §404.1532(d), and the types of

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duties performed, 20 C.F.R. §404.1532(a), are to be considered as well as the amount of time the individual spends at work. 20 C.F.R. §404.1533. Earnings at the rate of \$200 per month or more establish a presumption that the individual has the ability to engage in substantial gainful activity. 20 C.F.R. §404.1534(c).

Plaintiff in the present case worked at his usual occupation of car salesman for approximately six months during his alleged period of disability, from June 1, 1973 until December, 1973. During that time, he earned approximately \$6,000 (Tr. 26). There is no indication in the record that plaintiff was given any special treatment during the course of his employment. Rather, it would appear from plaintiff's testimony that his work was substantial. Plaintiff testified that he worked as a full time car salesman (Tr. 49). When plaintiff left this job in December of 1973, there was no indication that he was leaving because he was unable to do the work. In fact, the record shows that plaintiff left due to a dispute with his employer, totally unrelated to any medical impairment (Tr. 147-49).

In light of the fact that plaintiff received no special considerations at his job, which was identical in nature to his former employment, worked a full day, earned approximately \$1,000 per month and left for reasons totally unrelated to his alleged impairment, it was proper for the

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Administrative Law Judge to cite plaintiff's work during his claimed period of disability as evidence that plaintiff was not disabled. 42 U.S.C. §423(d)(4); 20 C.F.R. §404.1532-404.1534; Wright v. Weinberger, 391 F. Supp. 390 (D. Md. 1975); Zimbalist v. Richardson, 334 F. Supp. 1351 (E.D.N.Y. 1971). Even in cases where the medical evidence standing alone would have established disability, courts have recognized that actual performance of substantial gainful activity during the alleged period of disability prevents an award of benefits under the Social Security Act. Kutchman v. Cohen, 425 F.2d 20 (7th Cir. 1970). See also Harmon v. Finch, 460 F.2d 1229 (9th Cir.), cert. denied, 409 U.S. 1063 (1972), rehearing denied, 410 U.S. 918 (1973); Price v. Richardson, 443 F.2d 347 (5th Cir. 1971); Adams v. Flemming, 276 F.2d 901 (2d Cir. 1960).

Although plaintiff worked during only one year of his alleged disability period, there is nothing in the record to indicate that plaintiff's condition in the years prior to or subsequent to 1973 was any worse than during 1973 when plaintiff engaged in his former occupation. There is no evidence of significant change in plaintiff's condition after October, 1971. Plaintiff's ability to work as a car salesman in 1973 can properly be viewed as evidence indicating that he was able to engage in substantial gainful employment during the entire period of his alleged disability. Sanborn v. Weinberger, 383 F. Supp. 859, 867 (D. Del. 1974), Mann v. Richardson, 323 F. Supp. 175 (S.D.N.Y. 1971).

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Furthermore, during the periods when plaintiff was not working, in both 1972 and following his last employment in 1973, plaintiff was actively applying for unemployment insurance benefits. In New York State, an applicant for unemployment benefits must state that he is able to work, must report regularly for employment counseling and accept and follow up employment references. New York Labor Law §§ 590(a), 591(2), 596(2) (McKinney, 1965). When questioned about his applications for unemployment insurance, plaintiff stated that "Yes, I was ready, able and willing to work, but they let me go." (Tr. 29). Application for unemployment insurance is a factor that may be considered to support the conclusion that a claimant has not carried his burden of demonstrating that he is disabled within the meaning of the Social Security Act. Mann v. Richardson, supra, 323 F. Supp. at 179.

3. Subjective Evidence The Administrative Law Judge considered plaintiff's allegations of pain but found that such complaints were not disabling. This conclusion is supported by substantial evidence.

Although a plaintiff's subjective testimony must be considered by the Secretary, "the requirement that a claimant's description of symptoms and pain be considered does not mean that such statements must be accepted without question." Deyo v. Weinberger, 406 F. Supp. 968, 973 (S.D.N.Y. 1975). As stated in Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965):

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These principles do not require that disability benefits must be awarded whenever there is a subjective showing that a man cannot work because he hurts. Subjective symptoms must be evaluated with due consideration for credibility, motivation, and medical evidence of impairment. 345 F.2d at 897. Accord Peterson v. Gardner, 391 F.2d 108, 109 (2d Cir. 1968).

In the present case, plaintiff's allegations of pain could not form the basis for an award of disability benefits. In the first place, there is no medical evidence corroborating plaintiff's allegation that pain prevented him from working. Though plaintiff did complain of pain when sitting in October, 1971, following his operation, Dr. Zikria suggested only mild medication - aspirin or bufferin for relief. Both Dr. Zikria and Dr. Besser indicated that there were few restrictions on plaintiff's activity or movement, observations inconsistent with a diagnosis of disabling pain. Secondly, plaintiff's ability to perform substantial gainful activity during 1973 is evidence that he was not disabled by pain. Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971); King v. Gardner, 370 F.2d 652 (6th Cir. 1967). Finally, the Administrative Law Judge's determination as to plaintiff's credibility on the question of symptoms is entitled to great weight. Reyes Robles v. Finch, 409 F.2d 84, 87 (1st Cir. 1969).

4. Vocational Testimony Only when a plaintiff makes a showing that he cannot return to his former work is there a need for an administrative showing of work that the plaintiff can perform. 42 U.S.C. 423 (d)(2); Menses v. Secretary of Health, Education and Welfare, supra; Reyes Robles v. Finch, supra; Stumbo v. Gardner, 365 F.2d 275, 276 (6th Cir. 1966). In the present case, there was substantial evidence to support the finding that plaintiff retained the capacity to perform his job as a car salesman, a job that by plaintiff's own testimony involved no heavy labor or prolonged sitting. The medical evidence of record indicated that plaintiff could perform the tasks required of a car salesman such as walking in the car showroom, showing cars to customers and doing paper work. The fact that plaintiff worked at this occupation during his alleged period of disability is further evidence that he was capable of performing his former work.

When the record is viewed as a whole, it is clear that there is substantial evidence to support the determination of the Secretary that plaintiff was not disabled within the meaning of the Social Security Act.

POINT II

THE DISTRICT COURT DID NOT ERR
IN FINDING THAT PLAINTIFF WAS
NOT PREJUDICED BY LACK OF COUNSEL

Plaintiff has alleged that he was prejudiced in both the administrative and court proceedings due to his lack of counsel. There is no basis for this claim.

Plaintiff was informed of his right to counsel by letter at the time of notification of his reconsideration decision. At his hearing, the Administrative Law Judge again informed plaintiff that he had the right to be represented by counsel. Plaintiff replied that he thought he could best represent himself (Tr. 22, 42). Plaintiff was in no way misled concerning his right to counsel and affirmatively decided to represent himself. Ramirez v. Secretary of Health, Education and Welfare, 520 F.2d 902 903 (1st Cir. 1976); Steimer v. Gardner, 395 F.2d 197, 198-99 (9th Cir. 1968). In the absence of a showing of clear prejudice or unfairness at the agency level due to plaintiff's lack of representation, remand is inappropriate Domozik v. Cohen, 413 F.2d 5, 9 (3d Cir. 1969); Cross v. Finch, 427 F.2d 406 (5th Cir. 1970).

Plaintiff cannot allege clear prejudice or unfairness in the administrative proceedings. Unlike other cases such as Cutler v. Weinberger, supra, in which remand has been ordered due in part to lack of counsel, all evidence in the present case was considered by the Administrative Law

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Judge and plaintiff appeared to be intelligent and capable of representing himself at his hearing. Remand is inappropriate in a case such as this where plaintiff clearly waived his right to counsel and the hearing was properly conducted by the Administrative Law Judge.

CONCLUSION

It is submitted that the Secretary's determination is supported by substantial evidence and the decision of the District Court should, therefore, be affirmed.

Dated: New York, New York

September 21 , 1977

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant-Appellee

SHERRY J. LEIWANT
Special Assistant United States Attorney

PATRICK H. BARTH
Assistant United States Attorney

- Of Counsel -

ADDENDUM

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76 Civ. 699, JAMES E. CHRISTIAN - v - DAVID MATHEWS, Secretary
(Pro Se) of Health, Education and Welfare

Endorsement Order

Plaintiff James Christian brought this action for review of adverse administrative action by the Social Security Administration, pursuant to 42 U.S.C. §405(g). Pursuant to Mathews v. Weber, 423 U.S. 261 (1976), the case was referred to Magistrate Bernikow, and the Magistrate's Report was received February 7, 1977. Plaintiff filed objections to the Report on February 18, 1977.

It is settled that a decision of the Secretary denying disability benefits must be sustained by the Court if it is supported by "substantial evidence." Richardson v. Perales, 402 U.S. 389, 401 (1971). The decision of the administrative law judge herein was based upon a resolution of certain conflicts in the medical testimony presented in that proceeding. The law judge resolved the conflict against the plaintiff.

As stated by the Magistrate in his careful Report, plaintiff cannot overturn an administrative ruling merely by arguing that the law judge should have given more or less weight to certain of the medical opinions expressed.

"Resolution of conflicts in the evidence including medical opinion, are matters solely within the province of the Secretary. Whether the court agrees with the correctness of the Secretary's determination is beside the point; it cannot displace the administrative body's choice between two fairly conflicting views even though the court might have reached a different conclusion." Hofacker v. Weinberger, 382 F. Supp. 572, 576 (S.D.N.Y. 1974).

Much of plaintiff's opposition to the Report is based upon his claim that he has been prejudiced in these proceedings because he has proceeded pro se. The Court finds absolutely no basis in the record for this claim. This is a case where the plaintiff has failed to present evidence sufficient to overturn the administrative finding not due to lack of presentation or preparation, but simply because such evidence does not exist. See Pruitt v. Commercial Carriers, Inc., 395 F. Supp. 1040, 1044, (N.D. Ala. 1974).

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In taking this appeal from the administrative determination, plaintiff undertook a difficult task. The test is not whether there is evidence which could have supported a different result. Rather, the general rule which is applicable here is that the Court must sustain the decision of the Secretary if it is supported by substantial evidence on the record as a whole. Cutler v. Weinberger, 516 F.2d 1282, 1285 (2d Cir. 1975).

The Magistrate applied this standard and determined that the findings of the Secretary should be affirmed. The Court agrees with the through Report of the Magistrate, and concludes that under the standard set forth above, the decision below must be affirmed.

For the foregoing reasons, the objections of the plaintiff to the Magistrate's Report are overruled and the Report adopted in full.

Judgment should be entered for the defendant affirming the finding of the Secretary. Counsel for the defendant is directed to submit an appropriate order of judgment on notice.

SO ORDERED.

LAWRENCE W. PIERCE
U. S. D. J.

Dated: New York, New York
April 6, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
JAMES E. CHRISTIAN :

Plaintiff, :

-against- :

DAVID MATTHEWS, SECRETARY OF HEALTH :
EDUCATION AND WELFARE :

Defendant. :

REPORT OF UNITED
STATES MAGISTRATE

76 Civ. 699

-----x
TO THE HONORABLE LAWRENCE W. PIERCE, U.S.D.J.:

In this action, plaintiff, appearing pro se, seeks judicial review, pursuant to Section 205(g) of the Social Security Act, as amended, (42 U.S.C. §405(g)), of adverse administrative action by the Social Security Administration, which rejected plaintiff's claim for disability benefits. Plaintiff has failed an "Answer" and I will deem it to be a motion for judgment on the pleadings. Defendant has cross-moved for judgment on the pleadings. Plaintiff, in his complaint, claims that the decision of the administrative law judge, as affirmed by the Appeals Council, was erroneous, and not supported by substantial evidence on the record, as well

as contrary to the law.* Pursuant to Matthews v. Weber, 423 U.S. 261 (1976), you referred the matter to me to hear and recommend.

THE FACTS

According to the uncontested evidence before me, plaintiff is a 56²⁷ year old male, who has normally been employed as an automobile salesman (Tr. 25). His present claim for disability benefits arises out of an accident which occurred on June 20, 1971, when petitioner was shot twice in attempting to aid a neighbor who had been robbed (Tr. 10; Ex. 15). Plaintiff was thereafter operated upon on three occasions (Tr. 30). The first operation was preformed to remove a bullet from plaintiff's abdomen, and a second, in September, 1971, to remove a bullet from his coccyx (Tr. 128). During this latter operation, the tip of plaintiff's coccyx was removed.

On July 20, 1971, plaintiff filed an application with defendant for disability insurance benefits (Tr. 51-54). This application was denied by letter dated November 19, 1971

* Plaintiff has also petitioned the Court to award treble damages against the Secretary and have portions of his employment record, as it appears in the Social Security Administration's records, amended to correct a 10 1/2 year missing period. Neither of these remedies can be effected through a review proceeding of this nature brought under 42 U.S.C. §405 (g), under which the court is limited to determining whether the Secretary's determinations are supported by substantial evidence in the record.

(Tr. 57-58). Plaintiff filed another application for the same relief on November 30, 1972 (Tr. 59-62). In this application, plaintiff stated that he did not remember receiving the November 19, 1971 denial, and that he had been told that it was too late for a reconsideration of that determination (Tr. 62). This second application was denied by letter dated September 5, 1973 (Tr. 65). Plaintiff's April 24, 1974 request for reconsideration of this latter determination (Tr. 68), was also denied (Tr. 70). By letter dated November 25, 1974, plaintiff requested a hearing before the Bureau of Hearings and Appeals (Tr. 17-19), and that request was granted (Tr. 14-16).

The hearing took place on June 3, 1975 before Administrative Law Judge Fenster.* While only plaintiff testified, copies of medical reports, records of employment history, and plaintiff's numerous requests for compensation from various public agencies were submitted as exhibits, con-

* Plaintiff appeared without counsel, answering Judge Fenster's advice that he may appoint counsel by saying, "I think that I can best represent myself because I know more about it than anybody else and you will get it first hand" (Tr. 22). Failure to appear with counsel is not not necessarily prejudicial to a claimant's case, nor it is a ground for reversal when the administrative law judge assumes his "duty [to] scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts..." Cutler v. Weinberger, 512 F.2d 1282, 1285 (2d Cir. 1975) (citations omitted). A reading of the transcript indicates that Judge Fenster did not abdicate that duty.

sidered by the Administrative Law Judge, and incorporated into the record.

The record indicates that plaintiff was out of work from the date he was shot, June 20, 1971, until June of 1973 (Tr. 30). For a 19 week period after June 20, 1971, plaintiff received \$75.00 per week from a state disability insurance policy (Tr. 33, 62, 145). On March 29, 1972, he was awarded \$638.00, covering the period from June 21, 1971 to November 8, 1971, from the New York State Crime Victims Compensation Board (Tr. 30-33, 143-45). After November 8, 1971, plaintiff received unemployment compensation for the maximum allowable period (Tr. 10, 34, 36, 37).*

In June of 1973, plaintiff returned to his usual occupation as automobile salesman and worked in that capacity until December of 1973, earning \$6000.00 during this period (Tr. 10, 25, 26). Upon termination of this employment, plaintiff sought unemployment benefits, but the question of his entitlement to those benefits has not yet been resolved (Tr. 27). The issue surrounding that controversy is whether petitioner voluntarily left his employment without good cause by provoking his discharge (Tr. 27, 148, 149). On May 1, 1975, the Appellate Division of the New York State Supreme Court

* While the transcript indicates that this period extended for 39 weeks, plaintiff, in his "answer" alleges that he received unemployment benefits for a 26 week period only. This minor inconsistency appears to have no effect on the substance of plaintiff's claim.

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reversed a decision of the Unemployment Insurance Appeals Board which had denied benefits to the plaintiff, and ordered the Board to conduct further proceedings and reconsider the case (Tr. 148-49).

The medical evidence reviewed by Administrative Law Judge Fenster and incorporated into the record is somewhat contradictory. This evidence includes reports of Dr. Zikria, a physician who treated plaintiff at Presbyterian Hospital for some time after the shooting incident, and re-examined the plaintiff in January, 1975 in connection with plaintiff's application for public assistance. The report of this examination (Tr. 105), on which plaintiff relies heavily, stated that (1) plaintiff was only capable of working part-time (4 hours a day for 3 days a week); (2) plaintiff could perform functions such as walking, climbing, standing, carrying, etc. only to a limited extent and could not work at a high of speed; (3) in Dr. Zikria's opinion, plaintiff could not work "at his usual or last occupation."

On the other hand, there is the report of Dr. Walter Besser, a surgeon and orthopedic specialist, who examined plaintiff on May 27, 1975, in connection with plaintiff's application for supplemental security insurance benefits (Tr. 152-55). Dr. Besser, while noting that the plaintiff complaint of pain, found that "the patient has no limitation

for walking, can stand without limitation, can lift up to 50 lbs., can sit without limitation, can bend every 10 minutes." Dr. Besser found plaintiff to be a well developed male "in no apparent distress." (Tr. 152).

THE ADMINISTRATIVE LAW JUDGE'S FINDINGS

Judge Fenster's findings, as approved by the Appeals Council, determined that plaintiff was not "disabled" within the meaning of §223(d)(1)(A) of the Social Security Act, and was, therefore, not entitled to disability benefits (Tr. 7-12). His conclusion was based primarily on the following considerations:

(1) By applying for unemployment benefits after the termination of employment as an automobile salesman in December, 1973, plaintiff indicated that he was ready, willing, and able to work, as that requirement is a condition imposed by law which must be met in order to be entitled to unemployment compensation (Tr. 10). (It is interesting to note that at the hearing before Judge Fenster, when discussing the termination of his employment, plaintiff alleged that "I was ready, able and willing to work, but they let me go." (Tr. 29).

(2) The fact of plaintiff's employment from June, 1973 to December, 1973, two years after the shooting incident, during which time plaintiff earned \$6000.00, indicated that

no disability existed.

(3) The report of Dr. Besser's May, 1975 medical examination indicated that plaintiff was in "no apparent distress."

(4) Dr. Zikria's report indicated that plaintiff could engage in work, but with certain limitations. As plaintiff's vocation as a car salesman was found not to be "a strenuous job which would require a great amount of physical stamina," (Tr. 11), Judge Fenster apparently felt that whatever limitations on work capacity which existed did not bar plaintiff from being gainfully employed.

In short, Judge Fenster concluded that the injury caused to plaintiff's spine by reason of the shooting incident "was not sufficiently severe to preclude substantial gainful activity for 12 months or more," and that "[t]he claimant retains his residual capacity to return to work on an automobile salesman" (Tr. 12).

THE STANDARD OF JUDICIAL REVIEW

The standard of judicial review which a court should adopt when reviewing a finding of the Secretary was recently restated by Judge Cannella in Wolf v. Sec. of HEW, CCh Unempl. Ins. Rep. ¶ 14,202 at 2400, 2403-04 (S.D.N.Y. Mar. 10. 1955):

It is settled that a decision of the Secretary denying disability benefits must be sustained by the Court if it is supported by "substantial evidence." 42 U.S.C. §405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971), Herbst v. Finch, 473, F.2nd 771, 774 (2d Cir. 1972)...This standard of review requires that existence of evidence which is "more than a mere scintilla. It means such relative evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. at 401. "[W]here there is only a slight preponderance of evidence on one side or the other, the Secretary's findings should be affirmed." Selig v. Richardson, 379 F. Supp. 594 (E.D. N.Y. 1974).

In addition, it should be noted that the plaintiff has the burden of showing "the existence of a disability and to rebut the presumption of regularity and correctness of which the Secretary's findings of non-entitlement to benefits is possessed." Wolf v. HEW, supra at 2404 (citations omitted).

APPLICATION OF LAW TO THE FACTS

Applying the standard of review set out above to the record of this case, it is clear that the plaintiff has not borne his burden of proof and that the agency's conclusions are supported by substantial evidence.

Plaintiff disputed the administrative law judge's determination, contending primarily that it relied heavily on Dr. Besser's report which, in the plaintiff's opinion, should be discounted. Plaintiff argues first, that Dr. Besser is an arthritic specialist who, therefore, has no expertise regarding plaintiff's non-arthritic condition, and, second, that Dr. Besser failed to give plaintiff a complete examination.

As to the first contention, although Judge Fenster's report stated that Dr. Besser was a specialist in arthritic surgery, (Tr. 10), the exhibit of Dr. Besser's professional qualifications clearly states that Dr. Besser's specialty was in orthopedic surgery, not arthritic (p. 156). As to plaintiff's argument regarding the completeness of Dr. Besser's examination, that contention is a mere allegation, supported by nothing in the record or plaintiff's moving papers, and therefore, must be discounted.

It also appears that Dr. Besser's report is contradicted by the report of Dr. Zikria.* While that may be so, "[r]esolution of conflicts in the evidence including medical opinion are matters solely within the province of the Secretary. Whether the court agrees with the correctness of the Secretary's determination is beside the point, it cannot displace the administrative body's choice between two fairly

* The Secretary alleges that Dr. Zikria did not actually examine the plaintiff before making this report (see Defendant's brief p. 15). It is not clear from the record whether plaintiff was, in fact, actually examined personally. However, Judge Fenster appeared to have considered it in the same manner as the report of Dr. Besser, which was clearly based on a personal physical examination. In light of my finding that his decision for the defendant was based on substantial evidence, the question of whether Dr. Zikria's report was the result of a personal physical examination is not crucial.

conflicting views even though the court might have reached different conclusion." Hofacker v. Weinberger, 382 F. Supp. 572, 576 (S.D.N.Y. 1974). Although it is true that Dr. Zikria was plaintiff's treating physician, his report, as defendant argues, is conclusory in nature. Dr. Zikria merely completed a form by checking appropriate boxes. The Secretary is not bound by this type of medical testimony as to disability. Lewis v. Weinberger, 515 F.2d 584, 587 n.2 (5th Cir. 1975). See also Hofacker v. Weinberger, 382 F. Supp. 572, 576 (S.D.N.Y. 1974); Mullen v. Gardner, 256 F. Supp. 588, 590 (E.D.N.Y. 1966).

Reviewing the record in this light, I cannot accept plaintiff's contentions. How much weight to be given to a medical report is generally within the discretion of the agency, and absent some strong countervailing considerations,* the agency's determinations must be accepted by the reviewing court as conclusive.

* In Cutler v. Weinberger, 512 F.2d 1782 (2d Cir. 1975), for example, the court reversed and remanded a determination by the Secretary where, among other factors, the record contained medical records which were illegible and led the court to express the consideration that it had "no way to determine whether the Secretary fully understood some of the medical reports before him." 512 F.2d at 1285. In the instant case, while portions of Dr. Besser's report are, in fact, illegible in the copy that appears in the record, the pertinent parts, which supported the Secretary's determination, were quoted by Judge Fenster in his decision, and can be read. Other portions, the "impression" of Dr. Besser, while not totally legible in the copy in the record, were also quoted by Judge Fenster, indicating that the copy before him was, in fact, legible.

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Finally, there is support found for Judge Fenster's determination in the fact the plaintiff worked at his usual occupation for 6 months long after the initial injury, and subsequently sought, and is apparently still seeking unemployment benefits. As stated above, receipt of such benefits is contingent upon a claimant's ability to work. This fact, coupled with plaintiff's own admission that he "was ready, able and willing to work," and the very fact of plaintiff's employment could reasonably have led Judge Fenster to determine that petitioner was not "disabled" within the meaning of the Act.

In short, following the "general rule that [the] court must sustain a final decision by the Secretary if it is supported by substantial evidence on the record as a whole," Cutler v. Weinberger, 512 F.2d 1282, 1285 (2d Cir. 1975), I recommend that the Secretary's determination be affirmed.

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CONCLUSION

For the reasons herein stated, it is recommended that an order and judgment issue in favor of the defendant in the case. It is, therefore, recommended that the Secretary's findings be affirmed and that judgment on the pleadings be granted in his favor.

Copy of this Report has been mailed this date to plaintiff and the attorney for the defendant who are hereby instructed that any objections to this Report should be filed at your Chambers within ten days from the date hereof.

Dated: New York, New York

February 7, 1977

Respectfully submitted,

LEONARD BERNIKOW
United States Magistrate

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AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
23rd day of September 19 77 she served ~~XXXXXX~~ of the
within Brief for Defendant-Appellee

by placing the same in a properly postpaid franked envelope addressed:

James E. Christian
730 Riverside Drive
Apartment 2-A
New York, New York

And deponent further says s he sealed the said envelope and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian L. Byast

23rd day of September, 19 77

PAULINE P. TROLA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978